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THE POWER OF THE SENATE TO AMEND A TREATY

THE recent refusal of the Senate to ratify eight general arbitration treaties which the President had concluded with Austria-Hungary, Switzerland, Great Britain, France, Portugal, Germany, Mexico, and Norway and Sweden, until, against the protest of the President, it had modified them materially by amendment, has called public attention to the treaty-making power, and has raised the question as to whether or not any of that power is vested in the Senate. The power and authority to establish, regulate, and maintain relations between this country and foreign nations has been delegated without reservation or restriction to the general government, no check or control over the exercise of the power having been retained by the states, or by the people. Under the articles of confederation, a very considerable part of this sovereign power was retained by the states. Article VI provides: "No state, without the consent of the United States in Congress assembled shall send any embassy to or receive any embassy from or enter into any conference, agreement, alliance, or treaty with, any King, Prince, or State.

"No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into and how long it shall continue.

"No state shall lay any imposts or duties, which may interfere with any stipulation in treaties entered into by the United States, in Congress assembled, with any King, Prince, or State, in pursuance of any treaties already proposed by Congress, to the Courts of France and Spain."

Article IX declared that, "The United States in Congress assem-

bled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.”

The division of sovereignty thus created by the articles of confederation, between the general government and the several states proved of no advantage to either, and was a source of acknowledged weakness. The members of the general convention which framed our present constitution were unanimously agreed that full control over foreign affairs should be given to the general government. There was some conflict of opinion as to whom such powers should be confided, but none as to its being an unlimited and unrestricted grant of authority.¹ The plan suggested by Hamilton was finally adopted. Article II which enumerates the powers and duties of the President provides in section 2, that: “He shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.” Section 3, provides that the President “shall receive ambassadors and other public ministers” and “shall take care that the laws are faithfully executed and shall commission all the officers of the United States.”

In the due exercise of those powers, the President concluded those general arbitration treaties and submitted them to the Senate for its approval and concurrence. It does not appear that the Senate took any action upon the treaties in the form in which they were presented. It proceeded immediately to amend, and rewrite them, and after the treaties had been amended, they were ratified as amended. The original arbitration treaties recited that the contracting governments being “Signatories of the Convention for the pacific settlement of International disputes, concluded at the Hague, July 29, 1899,” and “taking into consideration that by Article 19 of that Convention, the high contracting parties have reserved to themselves the right of concluding agreements with a view to refer-

¹ 2 Elliot's Debates, pp. 368-369-379.

ring to arbitration, all questions which they shall consider possible to submit to such treatment," have concluded the following arrangements:

Article 1.—Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent Court of Arbitration, established at the Hague by the Convention of July 29, 1899; provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

Article 2.—In each individual case, the high contracting parties, before appealing to the permanent Court of Arbitration shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal, and the several stages of the procedure.

Article 3.—The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; it shall become effective on the day of such ratification, and shall remain in force for the period of five years thereafter.

The Senate amendment to these treaties (there was only one), struck out in section 2, the word "agreement" and inserted in its stead "treaty." Under the treaties as submitted, the President alone could make an agreement to submit certain questions to arbitration without first obtaining the advice and consent of the Senate; under the treaties as amended no agreement to submit any question whatever could be submitted unless such agreement was put in the form of a treaty and ratified by the Senate.

Before considering the power of the Senate to amend a treaty, let us examine the question in dispute between the President and the Senate over this particular amendment to these treaties. As we have seen the treaties negotiated by the President, gave him authority to submit questions that could not be adjusted by diplomacy. It is conceded that he has no such power under the Constitution and that it must be given him, if at all, by treaty, and since no treaty can be made except by and with the advice and consent of the Senate, that that body has the unquestioned right to give or withhold from him that power. The Senate had an undoubted right to refuse to clothe the President with any such authority. Whether or not their action was wise or not is a political question, one of policy, merely. Does their action safeguard in any manner the interests, rights, and liberties of the American people, or does

it tend to retard the submission of questions in dispute to arbitration and thus endanger the peace of the world?

It will be noticed that the agreements provided for in the second section of those treaties are by the express terms of section 1, limited to "differences which may arise of a legal nature and which it may not have been possible to settle by diplomacy," and that all questions "affecting the vital interests, the independence or the honor of the contracting parties and the interests of third persons," are expressly excepted. The language used clearly imports a desire on the part of the contracting parties that when any controversy which is a proper subject for settlement through the agency of diplomacy, cannot be adjusted by that means, then such question, but no other, shall be submitted to arbitration. If this is the true meaning and scope of those treaties they do not in the slightest manner abridge the powers and prerogatives of the Senate over any matter properly and exclusively within the domain of the treaty making power, since they simply provide that such questions only shall be submitted which the President in the first instance might by diplomacy adjust. When any controversy arises between this nation and a foreign power, which is a proper subject for diplomatic discussion and adjustment if the President and such foreign power can arrive at a mutual understanding, the matter is so adjusted, and the advice and the consent of the Senate are not necessary; if no mutual understanding can be reached by the President and such foreign power, then the President has exhausted his constitutional authority. As we have seen the President is not given by the Constitution power to submit such questions at that stage of the controversy to any court of arbitration, without having first, by a special or a general treaty, obtained the consent of the Senate. It was to give him that additional power that those treaties were negotiated. The Senate evidently regarded the power as one that it was dangerous, or at least, inexpedient, to confer upon the President.

One of the reasons assigned in justification of the Senate's action is that any such agreement made by the President would have the force and effect of a treaty, and that for the Senate to permit the President to enter into such an agreement without its advice and consent, would be a surrender of powers and prerogatives, conferred upon that body. Unquestionably every treaty is an agreement, but the converse of that proposition is not true that every agreement is a treaty, or that no agreement can be made between nations unless it is put in the form of a treaty and duly ratified and exchanged. The adjustment of any question in dispute between this nation and another by diplomacy is an agreement and quite

as binding upon the contracting parties as a treaty, and the violations of such an agreement might be a good and ample justification for a declaration of war. The reason given, therefore, is without force unless those treaties permitted the President to submit some question to arbitration which involves matters that ought not to be adjusted except by treaty. In other words does article 2 of these arbitration treaties which permits an agreement to be made to submit a large variety of questions to arbitration, all of which may be settled and adjusted without any treaty, solely by diplomacy, and also provides that no such agreement shall include certain other questions, give the President any authority directly or by implication to enter into an agreement to submit any question whatever which belongs exclusively to the domain of a treaty? No one has pointed out a possible question of that kind. No effort was made on the part of the Senate to correct any omission of that kind. What the Senate did in effect was to declare that they would not ratify any general arbitration treaty, and they have made the negotiation and ratification of such a treaty impossible.

Having pointed out the nature of the controversy between the Senate and the President and the purpose and effect of the Senate's amendment, let us consider the right of the Senate to amend a treaty in any particular whatever. What provision of the Constitution confers upon the Senate directly or inferentially such power and authority? If it possesses that power it has been specifically or inferentially conferred by Section 2 of Article II of the Constitution quoted above. That section gives the President expressly the power to make treaties. The authority, power or prerogative to advise the President and to concur is given to the Senate. The implied powers conferred upon the President and upon the Senate are limited to those which are necessary and essential to enable each to exercise the power specifically granted. The power to advise and concur does not include the power to negotiate a treaty since the Senate cannot take the first step in that direction. It has no authority to communicate with or to receive any communication from any foreign government. Congress, the Senate and House united, possess no such authority. In January, 1877, Congress passed two joint resolutions, congratulating the Republic of Pretoria in South Africa and the Argentine Republic in South America, upon their establishment of a republican form of government. One of the resolutions directed the Secretary of State to acknowledge the receipt of a dispatch from the Argentine Republic and the other directed him to communicate to the Republic of Pretoria, the high appreciation of Congress for the action of that Republic. President Grant vetoed both resolu-

tions, on the ground that under the Constitution the President was the proper agent to communicate with foreign powers and that it was unconstitutional for Congress to hold any such communication. No attempt was made to pass either resolution over the veto.²

To every treaty made between the United States and a foreign power there are two parties, and in negotiating such treaty each is represented by an accredited agent. The President, and not the Senate, is the agent of the United States, and necessarily her sole agent, since neither the Senate, nor the Senate and House together, Congress, can communicate with such foreign power. The Senate of course may advise the President during the negotiation, and that course is often followed. Indeed the charge is sometimes made that when the Senate has been consulted, its advice received and followed, a treaty drawn in harmony with that advice fails of ratification. The failure of the Senate to ratify a treaty negotiated under those circumstances, is not unconstitutional. The constitutional requirement is that the treaty is to be made by and with the advice and consent of the Senate. The Senate may therefore advise and then refuse to consent to a treaty made in accordance with its advice. The Constitution may contemplate that the Senate shall be governed by the advice which it gives, but such implied requirement is not mandatory. Not until after the treaty has been finally concluded by the President on the part of the United States and the foreign power, not until it has been made, written, does it come before the Senate for its consideration. Since the Senate cannot communicate with a foreign power, a party to the treaty, no change can be made in that document by the Senate because the consent of the foreign power to make such a change is necessary. For the Senate to arrogate to itself any such power is futile and an inexcusable attempt to exercise a power expressly conferred by the United States upon the President.

If a treaty negotiated by the President and submitted to the Senate for ratification is in fact rewritten by the Senate,—if it can be changed in part it may be changed altogether—and if such treaty so rewritten is afterward approved by the President and the foreign power, and thus becomes a valid treaty, who made it? The President, by and with the advice and consent of the Senate, or, the Senate by and with the approval of the President and the foreign power? And if a treaty so rewritten is afterward accepted by the high contracting parties as modified must it be again submitted to the Senate to be ratified?

That section of the Constitution which confers upon the President

² Messages and Papers of the Presidents, Richardson, Vol. V, p. 430.

power to make treaties confers upon him also authority to make appointments, and each of those powers is to be exercised by and with the advice and consent of the Senate. The power, authority, privilege, or prerogative conferred upon the Senate to bestow advice and to give or withhold its consent both as to appointments and to treaties, is clothed in the very same words, and those words are found in the same article of the Constitution in the same section and in the same sentence, and there is nothing in any other provision of the Constitution which modifies in the slightest degree the power, privilege, authority, or prerogative, so conferred in each case. If, therefore, when a treaty is submitted to the Senate, it may change it in form and in substance by striking out words, sentences, or paragraphs, and inserting other words, sentences and paragraphs, having a different meaning and purport, then when an appointment is under consideration it may follow the same course in exercising a like power or prerogative. Consequently when the President sends to the Senate for confirmation the names of several persons appointed by him, to fill certain offices designated, it may proceed to strike out the name of some appointee and insert that of another person, or, being persuaded that the appointees and the offices are mismated, it may rectify the presidential blunder in that regard, by a careful and judicious substitution and transposition of men and offices and then, having thus advised the President as to what he ought to have been done, and acting upon the maxim that what ought to have been done, will be regarded as having been done, confirm the appointments as corrected and perfected. It has never been suggested by anyone that the Senate possesses any such power, nor has anyone, so far as we are aware, ever suggested any reason why the power to ratify a treaty is more ample in any direction than the power to approve an appointment to office. There are certain objections to permitting the Senate to amend a treaty that do not apply with like force to its substituting some other office for the one selected by the President for his appointee. In case of a treaty there is a third party, the foreign nation, who has not and cannot authorize the Senate to make any amendment. But in the case of appointments there are only two parties, the President and the Senate, and they can communicate with each other at any moment. There is, however, one objection to the Senate's amending a treaty that applies with equal force to its substituting some other person, for the appointee named or some other office for the office designated. If the Senate should make any such substitution, and the President should submit to the dictation, the appointment would be made by

the Senate with the approval of the President and not by the President with the concurrence of the Senate.

The power to make treaties and to make appointments are executive powers and under the English Constitution belong exclusively to the Crown. They were given to the executive department by our Constitution, but as a check upon their exercise a limited supervision was conferred upon the Senate, itself a fragment, or the corner stone, of the legislative department. No authority, as we have seen, was given expressly or by implication to the Senate to exercise either one of those powers. The Constitution confers exclusively upon Congress legislative powers. Article I, Section 1, provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." But the President is given a supervisory power over legislation which very closely corresponds to the supervisory power given the Senate over the executive power to make treaties and appointments. The power to advise Congress with regard to legislation is expressly given to the President. He is required to "recommend to their consideration such measures as he shall judge necessary and expedient." (Art. II, Sec. 2). And no bill passed by Congress shall become a law until it has been submitted to the President and approved by him, or, if disapproved, shall be passed over his veto. (Art. I, Sec. 7). Thus the power to legislate given exclusively to Congress is to be exercised by and with the advice and consent of the President. The fact that the President's advice may be disregarded and his veto overridden, does not enlarge or diminish the President's power to advise or to veto, nor does that fact enlarge or diminish the implied powers that are conferred upon the President incident to the power to advise and to disapprove. Whatever the President might do if his veto was final, he may now do. The power of Congress to pass a bill disapproved does not impair in any respect the authority of the President to exercise that power. It has to do solely with the effect of his veto.

Does anyone claim, or has anyone ever claimed, during the hundred and odd years that the Constitution has been in force, that the President has any authority whatever, when a bill is submitted to him for approval to change, modify or amend such bill in any particular, and then to approve the bill so amended? But if the Senate may amend a treaty it is asked to ratify why may not the President amend a bill he is asked to approve? As we have pointed out the fact that the bill is not approved by the President and must be returned and may notwithstanding his disapproval become a law, has no bearing upon the President's authority. If the Constitution had

provided that in case a treaty submitted to the Senate for approval was not approved, it might, with the Senate's objection, be submitted to the House of Representatives for approval, such a provision would not enlarge or diminish the authority of the Senate to advise and consent. Whatever the Senate may now lawfully do, in giving or withholding its consent, it might do if its consent was not absolutely necessary to the ratification of a treaty.

The power to amend implies that the individual or body possessing that power is clothed with authority to make a legal and valid change in the instrument to be amended. There is no pretense that the Senate can make any legal or valid alteration in a treaty. Unquestionably the Senate may suggest amendments; may advise the President that unless the treaty is changed and modified it will not be ratified. Such a course is an exercise of the power conferred upon the Senate. The power to suggest amendments differs widely and radically from the power to amend. The suggestion is an admission that the person making it has no power to make the amendment.

We have examined quite fully the power of the Senate to amend for the sole purpose of showing conclusively, not only that it possessed no such power but also for the purpose of showing that it has no authority whatever to exercise in that manner the power given it to approve or disapprove a treaty. There is no claim on the part of the Senate that it has any authority to amend, that it can make any valid change in a treaty which will bind either the President or the foreign power. The course of pretending to amend is adopted on its part for the two-fold purpose of defeating the treaty submitted and indicating at the same time the form of a treaty it would be willing to ratify. It may be asked what objection can there be to the Senate's "playing" at amending a treaty if the sole effect of its sport is merely to defeat the treaty, since its right to withhold its consent is unquestioned. There are many objections, some of which we have already indicated.

The Constitution gives the President power to make treaties by and with the advice and consent of the Senate. The President has the right to have the very treaty made by him approved or rejected. When the Senate amends no action is taken upon the treaty in the form submitted and the Constitution is thereby violated in spirit if not in the letter.

In assuming to amend a treaty, the Senate exercises a power not delegated to the Senate and expressly conferred upon the President. It is dangerous to permit any official or any department of the government to play at usurpation. It is a sport not to be countenanced nor tolerated by a free people.

The course pursued by the Senate relieves it from the responsibility incident to the approval or rejection of a treaty. If the Senate disapproves a treaty by amendment it may pretend, by ratifying the treaty as amended, that the Senate favors the treaty. This is illustrated by a remark recently made by a Senator (Carmack) in the debate upon the Navy Appropriation Bill. The Senator commenting upon what he characterized as a disposition on the part of the President to intermeddle with the business of the other departments of the government, said: "He has thrown the arbitration treaties into the fire because the Senate insisted upon its constitutional powers and prerogatives." This is a direct and specific charge that the failure of those treaties was due to the action of the President; that they were destroyed, not in the Senate chamber, but at the other end of the avenue, in the White House.

Pretending to change and modify a treaty may result in the defeat of a treaty that otherwise would be approved. It enables a bare majority to make changes solely for the purpose of protecting some local or sectional interest. This is especially true of every reciprocity treaty. The Senate has many members of great ability and of profound learning. The members naturally have great respect, often well founded, for a member's opinion upon any political or legal question. A new member is not supposed to be able to impart any information worthy of attention before he has breathed the air of the Senate chamber for at least one year. That particular custom has not in the past proved a source of any great calamity. The period of the novitiate might indeed in many cases be extended with profit to the Senate and to the entire satisfaction of the people. There has for some time been a growing custom, understanding or agreement that due regard and consideration for a Senator's personal feelings ought to prevent the confirmation of any appointment made by the President, if the appointee is *persona non grata* to either of the Senators from the state to which such appointment will be credited. That unwritten law, designated senatorial courtesy, requires and demands that, if necessary, the public welfare shall be sacrificed to gratify a personal peek or prejudice. So far as appointments are concerned, no confirmation is possible which will violate senatorial courtesy. This is so well understood by the public that when Senator Quarles was recently nominated for a judicial position in Wisconsin, and it was discovered that his appointment could not be confirmed until after March 4th, when his successor, Governor LaFollette, would be a member of the Senate, that the public press announced, as a fact that went without saying, that if Governor LaFollette objected the appointment would not be confirmed. If

any appointment is objected to on personal grounds, the nominee's character, ability, and qualifications, count for nothing. They are not considered. A person possessing the legal learning and ability of Chief Justice Marshall if appointed to fill the most inferior judicial office in the gift of the President, could not be confirmed if at any time in the past he had said or done anything to offend one of the Senators from his state and the affront had been remembered and had not been forgiven.

The law of senatorial courtesy embraces the ratification of treaties as well as the approval of appointments. It is not true, perhaps, that no treaty can be ratified which is objected to by some Senator on the ground that it is offensive to him personally. That is due, however, in a great measure, to the difficulty the Senator has in establishing the fact that it is personally offensive. When such an objection is made to an appointee, the proofs are immediately closed. The Senator having announced his state of mind as to that appointee, a fact exclusively within his own knowledge, there remains no foundation upon which a doubt of the fact can rest. In the case of a treaty the personal objection is not to the treaty itself, the inanimate offspring of wood pulp and some by-product of coal tar, but to the anticipated effect the treaty will have upon some personal, or local interest, which furnishes the Senator, or his family, or his relatives, or his henchmen with food, clothing, or votes. Whether or not such treaty will have the evil effect feared is, however, a matter of opinion, judgment. Senatorial courtesy does not, as yet, require a Senator to fore swear his duty to the people that some Senator's mere whim may be gratified. The Senator's fellow members may disagree with the objector as to the actual results which will flow from the practical operation of the treaty, or, they may agree with him in part, or, they may admit that as to one local interest the treaty will have the evil effects predicted but that the losses so inflicted will be more than counterbalanced by benefits conferred upon other local interests, or, they may believe that the evils predicted and which will follow are so insignificant, compared with the benefits which will accrue to the people at large, that they do not merit consideration, and consequently, if the Senate performed its constitutional function of approving or disapproving a treaty, in the manner contemplated by the Constitution, and voted to concur or reject the treaty, in the form in which it was submitted, this law of senatorial courtesy might in many cases be disregarded. The moment, however, that the Senate assumes to exercise the powers belonging to the President exclusively and to rewrite the treaty for his approval, it subjects itself to the mercy of any member, invoking the aid of senatorial courtesy

and insisting upon the adoption of some amendment which he claims is essential to make the treaty acceptable to some borough, hamlet, or local interest, in his "neck of the woods." Now the slogan, "love me, love my dog," rallies to his support political friend and political foe. Judging from the course taken in the Senate during the last few years, in regard to certain reciprocity treaties, the time will come, if the hour has not already struck, when no reciprocity treaty can be negotiated by the President which will be concurred in by the Senate before amendments have thoroughly impregnated it with the smell of codfish or some other pungent local odor.

This exercise by the Senate of its constitutional power to reject a treaty by pursuing a method *ultra vires*, illegal, void, and in form the usurpation of power conferred upon the President, is producing results naturally incident to any and every usurpation of authority. It has already produced in the senatorial mind, apparently, the impression, feeling, or belief, that to the Senate belongs of right the power to supervise and control the President's methods of conducting and managing the foreign and international affairs of the country; that he may not enforce the law of nations for the protection of the rights of American citizens in any foreign country without having first obtained the advice and consent of the Senate. The Senate has not thus far, claimed the right to take the first steps in negotiating a treaty, but it has in effect announced, that when the time arrives in the negotiation when the Senate must be consulted, it will then, *ex parte*, prepare a full and complete draft of a treaty which it will submit to the President and the foreign power as its ultimatum. It also seizes upon that opportunity to send for all correspondence in regard to the treaty or any other foreign transaction, and enters into a general discussion of our international affairs. It does this as a Senate, not as the upper house of Congress. The duty of enforcing the laws of nations rests upon the President, not upon Congress, much less upon the Senate. If this usurpation of power upon the part of the Senate to intermeddle with executive duty and to interfere with the President in his enforcement of the laws of nations continues, the time is close at hand when our foreign affairs, while nominally under the management of the President will in fact be under the control of the Senate, and the President will perform his duties as its confidential clerk—trusted amanuensis. Within the last few days a Senator (Bacon) introduced a resolution, inquiring whether or not the President could, without first obtaining the advice and consent of the Senate, enter into any arrangement or agreement with any foreign power under which this government might be permitted to collect any portion of the revenues of such foreign power

and apply them in payment of claims due to our citizens. We may naturally expect that some other Senator will soon inquire whether the President has the power without first obtaining the advice and consent of the Senate to order any war ship to any foreign port, for the purpose of safeguarding the rights of American citizens.

When the treaty of San Domingo was under consideration a Senator (Teller) introduced a communication from some junta in Paris, claiming legally to represent that unfortunate country and protesting against the ratification of the treaty. It was written in French and in that condition was comparatively innocuous, but the Senator, with malice aforethought, had had it translated into English and in that digestible form it was served up, discussed, and devoured. When only a few remnants remained, some Senator objected to the communication being received and considered on the ground that the Senate could not receive a communication from any foreign power. The Senator introducing the communication admitted that it could not be received for "consideration," but thought it might be for "discussion." The distinction between discussing a question and considering it, is not on the surface. The presiding officer did not instantly grasp the distinction and the objection was sustained. The Senators folded their napkins, the cloth was removed, and the crumbs shaken outside the chamber for those birds of passage, the reporters. Another step in that direction will permit and sanction an invitation to a foreign representative to give from his place in the diplomatic gallery of the Senate his views upon any question in dispute between his nation and the United States, not for consideration, but for discussion merely.

At this moment a British passport furnishes its possessor far better protection in any land which is under the control of the barbarian, the semi-civilized or the revolutionist, than does an American passport. The revolutionist, the semi-civilized and the barbarian hesitates and refrains from depriving a British subject of life, liberty or property, not through love of right, or respect for any particular Englishman, but on account of a well grounded fear that he will have to pay back four fold the value of the fruits of his wrongdoing as soon as steam and electricity can hurry a British agent to demand satisfaction. An American passport will be of no practical value to the holder when the enforcement of his rights under the law of nations depends in part upon the dilatory and sluggish movements of a body of men in which each of the ninety-five or more members can speak *ad libitum*, some of whom have shown the physical ability to talk through an entire quarter of the moon. The Senate might consider with profit that incident in the

life of St. Paul when he struck terror to the hearts of his jailors by asking them the simple question: "Is it lawful to scourge a Roman citizen?"

It does not appear that any member of the Constitutional Convention, when the treaty making power was under consideration, intimated that there was the slightest danger that the Senate would ever, under pretext of giving advice, and consenting to the making of a treaty, usurp the power itself. Mr. Gladstone has said, that our Constitution "is the most wonderful work ever struck off in a given time, by the brain and purpose of man." That is a scripture measure of praise "heaped up and running over." Much of it is well merited. The framers of the Constitution were not, however, either prophets or seers, but just honest patriots, hard headed, broad minded, and fearless in the discharge of duty. Some of the most carefully considered provisions of the Constitution have proved utterly worthless. Careful and deliberate thought was given by the Convention to several methods of electing the President. The scheme of having him chosen by an electoral college was finally adopted. It was stone dead in less than one-third of a century. A written Constitution prevented the body being cremated and so the remains were embalmed and the poor, dry, grinning mummy is compelled, once every four years, to perform mechanically and automatically, its constitutional functions. The debates in the Convention, and the essays in the *Federalist* upon the electoral college are now valuable principally for the clear and forcible proof they afford, of the utter fallibility and worthlessness of the judgment of the wisest and most learned, when it does not rest upon the solid and enduring foundation of actual experience.

The discussion of the treaty making power of the Constitution discloses the fact that the dangers which the framers sought to guard against were for the most part imaginary. All were agreed that the President was the proper person to exercise the power, if he could be trusted not to use it to overthrow the Republic, or to acquire a personal fortune.³ A monarchy built upon the ruins of the Republic was the bogey man who disturbed their waking dreams. To prevent the President from turning traitor or boodler the Senate was given a check upon his power to make treaties and appointments. And to still further curb his influence and prevent him from corrupting a portion of the Senate, a two-thirds majority of that body was required to ratify a treaty. The power to declare war was given to Congress. Congress could be trusted, and therefore Congress, by a bare majority vote, could plunge the nation into war.

³ *Federalist*, Nos. 64-75.

But the only condition upon which peace could be restored was to obtain the advice and consent of two-thirds of the Senators present. It was felt that the evils of war would necessarily only continue for a season and the blessings of peace should not be purchased at the price of giving the President an opportunity to seize a sceptre and a crown. Everyone felt that the usurpation of power on the part of a single executive was a present and a continuing danger. No one anticipated that there was any occasion for the slightest apprehension that the Senate would ever mar any provision of the Constitution. The result shows how far afield their fears led them astray. The President is elected by Electors *pro forma*, by the people in fact, and the people are given an opportunity once in every four years to condemn or approve his official conduct. He is held directly responsible for the faithful administration of the Executive Department, and there has never been any danger of any usurpation of authority on his part. The Senate never dies, is invulnerable to the ballot, indifferent to public opinion. Its conduct never comes before the people for approval or condemnation. One-third of its members are elected every two years, which renews its physical life but makes no change in its methods and purposes. It is natural that a body composed of able and ambitious men, not responsible for its official conduct, either to the people, or to any other department of the government, should steadily and persistently endeavor to increase its power and importance. The result is that a power given the Senate to prevent the President from overturning the Government and destroying the liberties of the people threatens now to seriously hamper the President in the exercise of his executive powers to the detriment of the people's interests at home and to the imminent peril of the rights of American citizens abroad.

B. M. THOMPSON.

UNIVERSITY OF MICHIGAN.